

J & J Manufacturing Corp. and Local 178, International Ladies' Garment Workers' Union, AFL-CIO. Case 1-CA-29445

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On a charge filed by Local 178, International Ladies' Garment Workers' Union, AFL-CIO (the Union) on June 8, 1992, the General Counsel of the National Labor Relations Board issued a complaint on July 22, 1992, against J & J Manufacturing Corporation, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act by failing and refusing to make contractually required contributions to various employee benefit funds. On August 19, 1992, and February 12, 1993, respectively, the Respondent filed an answer and an amended answer admitting all the factual allegations in the complaint and asserting an affirmative defense.

On June 14, 1993, the General Counsel filed a Motion to Transfer Proceeding to the Board and for Summary Judgment. On June 17, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.¹

Ruling on Motion for Summary Judgment

The Respondent's admission to all the factual allegations in the complaint establishes that: (1) the Union was the recognized and exclusive collective-bargaining representative of the Respondent's employees in an appropriate bargaining unit composed of all the Respondent's nonsupervisory production, packing, and shipping employees; (2) the Respondent was and is obligated under the terms of its collective-bargaining agreement with the Union to make weekly contributions on behalf of the unit employees to the Northeast Department, ILGWU Health and Welfare Fund, the ILGWU National Retirement Fund, and the ILGWU Health Services Plan; and (3) the Respondent stopped making the required contributions without prior notice to or consent of the Union.

It is well established that an employer who is a party to an existing collective-bargaining agreement violates Section 8(a)(5) and (1) of the Act when it modifies the terms and conditions of employment es-

¹ In its original response to the Motion to Transfer Proceeding and for Summary Judgment, the Respondent asserted, inter alia, that it had no record of ever having received a copy of the complaint and notice of hearing. The Respondent subsequently filed an amended response to the motion deleting this assertion.

tablished by that agreement without obtaining the consent of the Union. *Rapid Fur Dressing*, 278 NLRB 905, 906 (1986). Here, the Respondent has admitted that it has unilaterally discontinued making its contractually required payments to the Northeast Department, ILGWU Health and Welfare Fund, the ILGWU National Retirement Fund, and the ILGWU Health Services Plan. The Respondent raises as an affirmative defense that it lacks the financial ability to make the required payments. A claimed inability to pay, even if proved, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by the provisions of a collective-bargaining agreement. *Raymond Prats Sheet Metal Co.*, 285 NLRB 194, 196 (1987); *International Distribution Centers*, 281 NLRB 742, 743 (1986); and *Hiysota Fuel Co.*, 280 NLRB 763 (1986). Accordingly, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint and has not raised an adequate defense to the complaint allegations.

We find that there are no material factual issues in dispute, and in the absence of any cause to the contrary having been shown by the Respondent, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Fall River, Massachusetts, is engaged in the manufacture of curtains and related items. During the calendar year ending December 31, 1991, the Respondent purchased and received products, goods, and materials valued in excess of \$50,000 directly from points outside the Commonwealth of Massachusetts and sold and shipped from its Fall River facility goods valued in excess of \$50,000 directly to points outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All non-supervisory production, packing and shipping employees employed by the Respondent at

its Fall River, Massachusetts facility, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

At all material times the Union has been the designated exclusive collective-bargaining representative of the employees in the unit and has been recognized as such by the Respondent. Recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from January 1, 1991, through March 31, 1994. By virtue of Section 9(a) of the Act, the Union is the exclusive representative of the employees in the bargaining unit for purposes of collective bargaining concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

The parties' collective-bargaining agreement requires the Respondent to make weekly contributions on behalf of employees to the Northeast Department, ILGWU Health and Welfare Fund, ILGWU National Retirement Fund, and ILGWU Health Services Plan. Since about December 14, 1991, the Respondent has failed to make the weekly payments to the above funds and plan, and has not obtained the Union's consent. By those acts and conduct, the Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

CONCLUSION OF LAW

By ceasing during the term of the contract to make contractually required payments to the Northeast Department, ILGWU Health and Welfare Fund, ILGWU National Retirement Fund, and ILGWU Health Services Plan on and after December 14, 1991, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make whole the Northeast Department, ILGWU Health and Welfare Fund, ILGWU National Retirement Fund, and ILGWU Health Services Plan for all contributions that would have been paid but for the Respondent's unlawful discontinuance of payments.² In addition, we shall order the Respondent to reimburse unit employees for any

² Because the provisions of employee benefits fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

expenses ensuing from its failure to make such required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981), the amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, J & J Manufacturing Corporation, Fall River, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Local 178, International Ladies' Garment Workers' Union, AFL-CIO by failing and refusing to make contractually required monetary payments to the Northeast Department, ILGWU Health and Welfare Fund, ILGWU National Retirement Fund, and ILGWU Health Services Plan.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all contributions to the Northeast Department, ILGWU Health and Welfare Fund, ILGWU National Retirement Fund, and ILGWU Health Services Plan that have not been paid and that would have been paid in the absence of the Respondent's unlawful discontinuance of the payments, and make unit employees whole, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of payment due under the terms of this Order.

(c) Post at its facility in Fall River, Massachusetts, copies of the attached notice marked "Appendix."³ Copies of the Notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. September 20, 1993

James M. Stephens,	Chairman
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Dennis M. Devaney,	Member
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John Neil Raudabaugh,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain in good faith with Local 178, International Ladies' Garment Workers' Union, AFL-CIO by failing and refusing to make contractually required monetary payments on behalf of unit employees to the Northeast Department, ILGWU Health and Welfare Fund, ILGWU National Retirement Fund, and ILGWU Health Services Plan. The appropriate unit is:

All non-supervisory production, packing, and shipping employees employed by us at our Fall River, Massachusetts facility, but excluding office clerical employees, professional employees, guards and supervisors as described in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all contributions to the aforementioned funds and plan that have not been paid and that would have been paid in the absence of our unlawful discontinuance of the payments, and make unit employees whole, with interest.

J & J MANUFACTURING CORP.